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The changing legal position of the Khoisan in the Cape Colony, 1652-1795

by Robert Ross

One of the main themes of the history of the Cape Colony during the rule of the Dutch East India Company (VOC) is the slow breaking of the independence of the indigenous peoples of the Cape, the Khoisan¹). This process consisted of two distinct operations. On the one hand the Dutch fought a long guerrilla war with the cattle raiders, generally known as 'boschiesmans-hottentots', interspersed with periods when they were content to pay what amounted to protection money, or rather protection sheep and cattle²). On the other, those Khoisan who owned cattle were slowly stripped of their riches and forced to become either raiders or agricultural labourers and shepherds for the white farmers, if they were not able to escape from the orbit of the colony altogether. While it is relatively simple to grasp the first of these processes, as a historical researcher, since there exists abundant material in the form of complaints from farmers who had been robbed and reports of the expeditions sent against the robbers³), it is much more difficult to gather hard evidence as to the subjugation of the Khoisan to the farmers, eventually in a position which can best be described as that of bondsmen. For instance, there exists no information as to the number of cattle and sheep still in the possession of the Khoisan at any given date before 1798,

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N.B. V.O.C. is the standard abbreviation for *Vereenigde Oost Indische Compagnie* (the Dutch East India Company). When followed by a number, it refers to a volume in the archives of the V.O.C. in the Algemeen Rijksarchief in The Hague. This series has recently been renumbered and its designation changed from *Koloniale Archief* (K.A.). Where the Cape material is concerned, the new numbering may be obtained by adding 22 to the old.

¹) The Khoi, or Khoikhoi, used to be known as 'Hottentots', while the San were called Bushmen, or in the old Dutch terminology 'Bosjesmans-Hottentots'. This distinction between the two sorts of people was always very vague, and is generally not now accepted, except to the extent that there was a distinction between those who owned cattle, and those who did not and lived entirely by hunting, gathering and raiding. The former are now designated Khoikhoi (which they called themselves) and the latter as San (a derogatory term used for them by the Khoikhoi). In this paper, where I have used the term 'San', it is generally as a translation for the equally derogatory eighteenth century Dutch term 'Bosjesman Hottentot.' When no distinction is made between the two groups – and often it is meaningless to make any – they are known as Khoisan. On the whole question, see Richard Elphick, *Kraal and Castle, Khoikhoi and the founding of White South Africa* (New Haven and London, 1977).

²) P. J. van der Merwe, *Die Noordyaartse Beweging van die Boere voor die Groot Trek (1770 – 1842)* (The Hague, 1937), Ch III.

³) Van der Merwe (1937), *passim*, and Shula Marks, 'Khoisan resistance to the Dutch in the seventeenth and eighteenth centuries', *Journal of African History*, 13 (1972).

nor as to the proportion of Khoi who had been forced into the service of the farmers. At least this is not the case during the Dutch period, although the British administration at the beginning of the nineteenth century did collect information of this sort. As a consequence, the historian can either give up in despair and so miss one of the vital problems of early South African social history, or attempt to use an indirect approach to the matter. In this paper I shall attempt the latter course.

This I will try to do by analysing the shifts in the legal status of the Khoisan between the foundation of the Cape colony in the middle of the seventeenth century and its conquest by the British about 150 years later. This is possible because the records of the High Court of Justice in Cape Town (which dealt with all serious cases) have been preserved. Indeed there are copies of them in both The Hague and Cape Town archives. But it is not merely a case of looking where there happens to be information, without regard for the potential value of that information as an index of real phenomena. Subordination to the legal system of the colony entailed, so far as the Khoisan were concerned, subordination to white farmers. This was because, during the Dutch period, there was no conscious theory of imperial rule in the Cape colony. Later in the nineteenth and twentieth centuries, for murder or theft to go unpunished in a colony could only mean that that colony was not yet under the full control of the colonising power. Indeed it was almost a question of definition. The prime test of the control that a colonial administration exercised over the territory it claimed to rule was its ability to monopolise legitimate force, and thus turn all other users of force into criminals. But in the eighteenth century, the Dutch in South Africa did not claim such powers. In no sense was there the feeling that they had taken possession of a stretch of Africa and therefore had to rule it, and all its inhabitants. Rather the officials of the company exercised jurisdiction over persons, over the employees of the V.O.C., over the free burghers (the farmers and townspeople, generally of European descent, who were not in service of the Company) and over the slaves owned by the Company, by its servants and by the burghers.

In contrast, they did not initially seek any authority over the Khoisan, preferring to maintain the patterns they had used in Asia, where the local people remained under their indigenous legal system until well into the nineteenth century and where even immigrant communities in Dutch Towns, such as the Chinese in Batavia, appointed leaders who administered justice in their own community⁴. So the V.O.C. in South Africa only came

⁴) For an example of this, see L. Blussé, 'Batavia, 1618 - 1740: the rise and fall of a Chinese colonial town', *Journal of South-East Asian Studies*, 12 (1981).

to judge over Khoisan when there was no other authority which could do so, that is when the indigenous political institutions had completely disintegrated and the Khoisan were forced either to become farm labourers or to become cattle and sheep raiders. In other words, because the imposition of Dutch legal authority on the Khoi was a gradual, unplanned process, and in no way an integral part of the establishment of the Cape Colony, therefore the shifts in the legal status of the Khoisan provide an usable index of their shifting social position

Thus it was that the instructions which Jan van Riebeeck received when he left the Netherlands in 1651 to found the Dutch settlement at the Cape of Good Hope were largely concerned with the building of a fort (probably mainly for protection against the English) and with the growing of vegetables for the passing ships. However, the following passage was included, to provide the basis of relations with the Khoisan:

You will also make inspection near the fort for the land best suited to depasturing and breeding cattle, for which purpose a good correspondence and intelligence with the natives will be necessary, in order to reconcile them in time to your customs, and to attach them to you, which must be effected with discretion, above all, taking care that you do not injure them in person, or in the cattle which they keep and bring to you, by which they be rendered averse to our people, as has appeared in various instances⁵).

While this prohibition was repeated to the white inhabitants of the colony throughout the rest of the century ⁶), there seem to have been no other clear directions from Amsterdam as to the policy which the officials at the Cape were to adopt with regard to the Khoisan. However, when there was a serious clash between the Company and the Khoi they did authorise the adoption of strict measures. Thus in 1653, when the interpreter Herry and his following absconded with the complete cattle herd of the colony, killing the herdsman, the *Heren XVII* ⁷) ordered that:

on getting into our hands the person guilty of the murder of the boy he should be punished with death, as an example to others: and that on getting hold of Herry, unless he has been accessory to the murder, he

⁵) Donald Moodie, *The Record: or a series of official papers relative to the condition and treatment of the native tribes of South Africa* (Cape Town, 1838 - 42) I, p. 8.

⁶) M. K. Jeffreys (ed.), *Kaapse Plakkaatboek*, 6 vols. (Cape Town, 1944 - 51) I, pp. 45, 60, 96, 140, 180, 228 - 9, 267, 271, 301, 316, 329, 333.

⁷) These were the directors of the V.O.C. in the Netherlands.

should be banished to Batavia, there to be employed in chains on the public works⁸).

This plan was, however, not put into operation, as Van Riebeeck was unable to discover precisely who was guilty of the murder⁹). Moreover, the *Heren XVII* later ordered Van Riebeeck to be very cautious in his dealings with the Khoikhoi, and only to take such drastic measures as enslaving the immediate following of Herry and shipping them off to Batavia, or having them work in chains, collecting wood, if provocation became acute¹⁰). In general, it is clear that the *Heren XVII* preferred to consider the Khoikhoi to be an independent people, against whom revenge had to be taken should they murder a white¹¹), but who must in general conciliated, both for the purpose of persuading them to return escaped slaves¹²) and to 'draw them more and more towards us with their cattle'¹³). Nor was there any clear policy as to the legal position of the Khoi laid down by the various commissioners of the Company who visited the Cape at regular intervals during the course of the seventeenth century¹⁴). It was thus left to the officials in South Africa itself to determine precisely how they should deal with the Khoisan, particularly when disputes arose between the Khoi and the Europeans.

It should not be thought that, though the Dutch eventually crushed all independent Khoisan polities, their relations with the Khoikhoi chiefs were necessarily inimicable. There were of course conflicts, but these were certainly not willed by the Khoikhoi chiefs. Nor did the Company officials generally favour an aggressive policy. Such clashes as there were most frequently arose as a result of the actions of the less controllable subjects of both groups, the free burghers on the one hand and the more or less independent client hunters, the San, on the other¹⁵). In fact, the leading political authorities on both sides had far more interests in common than not, at least where the prevention of crime was concerned. The most serious crimes were the same in both cultures. The V.O.C. officials feared insubordination perhaps most of all – but this was not something which Khoikhoi could commit against Europeans – but over and above this their

⁸) Moodie, I, p. 54. On the episode as a whole, see Elphick (1977), p. 104.

⁹) Moodie, I, p. 60.

¹⁰) H. C. Leibbrandt, *Précis of the Archives of the Cape of Good Hope, Letters Received* (Cape Town, 1899) I, pp. 230 – 1.

¹¹) Moodie, I, p. 350.

¹²) Moodie, I, p. 387.

¹³) Moodie, I, p. 390.

¹⁴) A. J. Böeseken, *Nederlandsche Commissarissen aan de Kaap, 1652 – 1700* (Den Haag, 1938) pp. 77 – 83.

¹⁵) At least after around 1662, with the crushing of the peninsular Khoi. See Elphick (1977), Ch. V.

concern was to protect the company's and their own possession from theft, and to prevent the acts of violence and murder that so often accompanied such robberies. As regards their contacts with the Khoikhoi, it was the Europeans' stock that was most attractive and also most open to theft, although especially in the early years of the colony much metal was also stolen. Similarly, the Khoikhoi chiefs considered stock theft to be the greatest possible threat to their authority. Herder societies were always fragile entities, which were liable to collapse if they lost large numbers of stock. Moreover, the position of a Khoi leader depended almost entirely on his wealth, and on his ability to protect the wealth of his subjects. It is symptomatic that the concepts 'wealthy man' and 'chief' were equated in the Cape Khoi language¹⁶). As a consequence, the Khoi chiefs were in general willing to collaborate with the Dutch to capture and punish the cattle rustlers and sheep rieurs of the Cape, many of whom were quite prepared to kill in the course of their actions. Such theft, even from the Dutch East India Company, struck too close to the heart of the Khoi social structure for them to act otherwise¹⁷).

As a consequence, it was normal for Khoi who had fallen foul of the Dutch to be handed over for punishment by the V.O.C. to the respective Khoi chiefs. This was certainly the policy of Van Riebeeck¹⁸) and reached its apogee in 1673 when four Khoi, belonging to the Cochoqua tribe, who were at that time at war with the Company, were brought into the fort by the Company's allies, and the Cochoquas' enemies, the Chainouqua. It was established by the Governor and council that these men had participated in the murder of a burgher and soldier a few months earlier.

Whereupon they were given back to the Hottentot Captains Cuyper and Schacher, with a statement of their confessions, that they might act with them as their prisoners, in the manner usual with them, and as they might think proper. The permission had scarcely been pronounced, when all the Hottentots who had collected to the number of more than 100, could no longer restrain their fury and bitter envy, but called out, 'beat the dogs to death, beat them to death', accompanying their words with such a shout of horrid joy, as if their enemies were already at their feet, and they triumphing over them: each of them furnished himself with a good cudgel and impatiently

¹⁶) G. Harinck, 'Interaction between Xhosa and Khoi: emphasis on the period 1620 - 1750', in L. Thompson (ed.), *African Societies in Southern Africa* (London, 1969), p. 164.

¹⁷) This analysis closely follows that of Elphick (1977) pp. 43 - 49.

¹⁸) See, for instance, D. B. Bosman (ed.), *Daghregister gehouden by den oppercoopman Jan Anthonisz. van Riebeeck*, 3 vols. (Cape Town, 1952 - 1955), II, p. 111.

awaited the delivery of the condemned persons: these, being at length brought in front of the gate (of the castle) and given over, were so welcomed and saluted with sticks; that one after the another they sunk on the ground and expired¹⁹).

In a sense this illustrates peculiarly poignantly the major theme of this paper. In the establishment of political authority, particularly in a conquest state such as the Cape Colony, the boundary between crime and war, and thus between jurisdiction and policy, is narrow, but as yet the Dutch had not crossed that boundary.

Five years later, a group of 'rebel plundering Hottentots' who had previously been incarcerated by the Company, but had escaped, were recaptured by the Khoikhoi and brought into the castle. On this occasion, they were hung on the orders of the Governor, but only after the Khoi chief who had effected their arrest had been informed of this procedure and had merely answered 'dats goed'²⁰).

However, in the decade in which these events occurred, the Cape government had for the first time to decide on its competence to sentence a Khoikhoi who had been 'detrified' and had lived all her life in Cape Town, spoke Dutch, had gone to church and 'become habituated to our manners and mode of dress'. Judicially, the case is of particular interest since Sara, the woman in question, had committed suicide, and thus no motives of revenge, and scarcely any of setting an example, played a role in the arguments as to the treatment of her corpse. The *fiscaal*²¹) claimed that:

She had enjoyed, like other inhabitants, our protection, under the favour of which she loved; as this animal /*bestie*/ then, has not only, actuated by a diabolical inspiration, transgressed against the laws of nature, which are common to all created beings; but also, as a consequence of her said education, through her Dutch mode of life, against the law of nations and the civil law; for having enjoyed the *good* of our kind favour protection, she must consequently be subject to the rigorous punishment of evil; seeing that those who live under our protection, from whatever part of the world they may come and whether they be christians or heathens, may justly be called our subjects— and as this act was committed in our *territorium*, and in a free man's house under our

¹⁹) Moodie, I, p. 331.

²⁰) Moodie, I, pp. 364 – 366.

²¹) The *fiscaal* was the chief legal officer of the Cape colony and acted prosecutor, except where crimes were committed outside the Cape district when his place was taken by the *landdrost*, or magistrate, of the relevant district.

jurisdiction; which should be purified from this foul sin, and such evil doers and enemies of their own persons and lives visited with the most rigorous punishment. It is upon these grounds claimed and concluded by the *fiscaal* that the said dead body, according to the usages and customs of the United Netherlands, and the general practice of Roman law, be drawn out of the house, below the threshold of the door, dragged along the street to the gallows, and there hanged upon a gibbet as carrion for the fowls, and the property of which she died possessed confiscated for the payment, therefrom, of the costs and dues of justice²²).

This mixture of natural law ideology and the concepts of territorial jurisdiction was accepted by the Court of Justice and her body consequently dishonoured.

In a certain sense, however, this case was most exceptional. Presumably because it was forced upon them in what was still a very small, face-to-face community, the Dutch authorities had to take action in a case where the criminal and the victim were both Khoi, or rather were they both the same individual. With the exception of one case in which a Khoi had been wronged and made use of the colonial authorities to obtain redress in a civil action – a man from one Khoi tribe had bitten another, and the Dutch imposed compensation of one cow²³) – it was to be well into the eighteenth century before the Cape court was again confronted with such matters. Moreover, this was a conscious decision at least sometimes. As late as 1741, a group of ‘bosjemans’ under their leader Keijser clashed with the Guriqua Khoi under Captain Hanibal, in the region of the Verloren Valley, north of the Piquetberg, about a hundred and fifty kilometers from Cape Town. Keijser and his followers who, according to the Guriqua, ‘sought war against them’, persuaded the son of the Guriqua captain, Claas Hanibal, to come to them. At first the meeting went peacefully, with pipes of tobacco being smoked, but then Keijser stabbed Claas, who attempted to escape by swimming across the Verloren Valley, but he was hit by the ‘bosjemans’ arrows and, as he came back to shore, killed. Keijser and his associated then crossed the river and rounded up such of the Guriqua’s cattle as they could lay their hands on.

The upshot of this fracas was that the Guriqua went to the *landdrost* of Stellenbosch to persuade him to take action against Keijser. Keijser,

²²) Moodie, I, p. 22.

²³) *VOG 4061*, Case of 18 Oct. 1708. There may have been other civil cases, but I have not been able to examine the records of civil cases after 1715, as they are not available in the Netherlands.

however, claimed that he had right to make war on the Guriqua as he himself had previously been stabbed by Claas Hanibal and because, during the last grain harvest, while they had been helping the boer Hendrick Crugel, a Guriqua Khoi, Spring in 't veld, had abducted a woman from among Keijser's followers. However, the rights and wrongs of the matter were of little importance to the Dutch *landdrost* and the Council of Policy, to whom he submitted his decision for approval. Rather, on the one hand, they were uncertain if they had any jurisdiction over Keijser 'who has always considered himself a sovereign chief of his own people' and on the other, they made a careful calculation of the relative costs of each decision. The Guriqua were reckoned, rightly, to be too powerless to cause trouble for the Europeans, unlike the 'bosjemans', who would certainly attack the outlying farms. Moreover, Keijser 'has always been a faithful champion (*voorstander*) of the Europeans, even against his own people (*natie*)'. As a consequence, it was not difficult for the Council of Policy – which, it should be noted, was almost identical in personnel to the Court of Justice – to conclude that there was no reason to take any measures to arrest Keijser.²⁴).

Given the ever present danger of raids by so-called 'bosjesmans-hottentots', it is not surprising that the Dutch authorities were disposed to treat such matters as political, rather than judicial. Nevertheless, from about the middle of the eighteenth century, crimes committed by one Khoi against another were routinely brought before the Court of Justice in Cape Town. Thus, to take but one example out of many, in 1751 a 20 year old Khoi, Klaas, was condemned to be broken alive, with the *coup de grace*, for having murdered two of the other Khoi, Plaatje and Nietje, who worked with him on the farm of Jacobus Botha. The argument had developed because Klaas accused one of his victims of trying to abduct his wife.²⁵) The colonial authorities had to take action in this sort of case to preserve order on the farms and because there was no longer any other legal body that could deal with the matter. At least where Klaas, Plaatje and Nietje were concerned, it is clear they were no longer under the authority of any Khoi chief. Rather it was their employer who had the day-to-day control over them. When matters occurred which were outside his competence, they were referred to the *landdrost* of Stellenbosch and the Court of Justice, which claimed the exclusive right to punish criminal behaviour within the orbit of the colony, even if that orbit was still defined in personal rather in territorial terms. As a

²⁴) VOC 4148, Resoluties van de Raad van Politie, 19 May 1741. Four years earlier, Keijser had been on a trading expedition with a group of whites to the Great Nama, during which he had raided a cattle kraal and shot the Nama captain, Gal. See *relaas* of Gaaren, Hale and Homi, 14 March 1739, in case against E. Barbier, 12 Nov. 1739, VOC 4142.

²⁵) VOC 4184, case 13 of 22 July 1751.

consequence, the moral code of the Dutch was at least partially, imposed on the Khoisan. Khoi adultery does not seem to have been punished, but there were several prosecutions for the more serious crime of 'sodomie'. However, it does not appear that Khoi were ever executed for these acts, with the exception of one man who had violated a cow in 1736.²⁶⁾ Thus legal regulation of Khoisan sexual behaviour was, interestingly, intermediate between that of whites and slaves. Whites were occasionally arrested and tried for adultery, unlike either Khoi or slaves, a consequence no doubt of the legal aspect of marriage which was not duplicated in the case of the other two groups. On the other hand, in so far as it is possible to generalise from the few cases available, it would seem that the punishment for Khoi 'sodemieten' ran parallel with that meted out whites, who were rarely if ever executed for this crime after the middle of the century, as opposed to that imposed on slaves, who were still routinely drowned.²⁷⁾

To a certain extent this divergence was merely an example of a general tendency in the Dutch opinions as to Khoi legal status. Whereas the European and slave population were always clearly subject to the laws of the colony, with the one group naturally treated with far greater severity than the other, throughout the eighteenth century there remained a certain doubt where the Khoi were concerned, at least in those matters where the Dutch realised that they might be dealing with actions which, though considered criminal by European law, might be allowed under Khoi custom. Thus in one of the cases of the 13 year old 'outeniqua' Khoi, Suyverman, who had been 'used as a woman' by a runaway slave for two months in the district of Swellendam, was asked if such behaviour was known among the Khoi and if he realised that he was doing wrong. His reply, at least as it was translated and then recorded in officialese, was that: 'I have never previously seen such things in my country, from which I presume that it must be evil'. He was flogged, and put on Robben Island for five years²⁸⁾.

A similar problem with which the Company officials were faced related to the treatment of Khoi witchcraft. Witchcraft was, of course, not a crime in South Africa, especially as the Netherlands were largely spared the great witchcraft hunting craze of the sixteenth and seventeenth century Europe²⁹⁾. Therefore, no-one, no matter what his or her background, ever came before

²⁶⁾ *VOC 4131*, case 7 of 12 April 1736; *VOC 4255*, case 13 of 16 June 1768; *VOC 4260*, case 13 of 21 Sept. 1769.

²⁷⁾ See Robert Ross, 'Oppression, Sexuality and Slavery at the Cape of Good Hope', *Historical Reflections/Reflexions Historiques*, 6 (1979).

²⁸⁾ *VOC 4255*, Case 13 of 16 June 1768.

²⁹⁾ For this see I. Schöffers, 'Heksengeloof en heksenvervolging: een historiographisch overzicht', *Tijdschrift voor Geschiedenis*, 86 (1973), pp. 232 – 235.

the court to answer any such charge³⁰). Nevertheless on two occasions, the court had to deal with Khoi who had murdered fellow Khoi because they were witches. However, the court did not treat this defence as completely worthless. Neither of the two murderers was put to death. In the first case, this may have been because the culprit, one Valentijn, was considered not to be in possession of all his faculties of reasoning, and thus not responsible for his actions³¹). He was therefore sent to prison on Robben Island to see if this really was the case. In the other case, there was no such mitigation. Rather the court conducted an investigation to discover whether or not the justification that Cobus Anthonij, a 25 year old Khoi living in the neighbourhood of Swellendam, gave for his actions was acceptable within the tenets of Khoikhoi culture. They ascertained that he had almost certainly exceeded his competence, as 'among the hottentots, whenever someone is bewitched by another, he would in turn bewitch the other.' Nevertheless they did not sentence him to death, as they would normally have done in such circumstances, rather ordering him to be flogged, branded and incarcerated in chains for life on Robben Island³²).

The fact that the colonial courts bothered to make this sort of investigation shows that, even into the last decades of the rule of the VOC at the Cape, the Khoisan were seen as a distinct group whose legal tradition had to be respected and who were not subject to the full extremities of Dutch law. Rather, as has been shown, the Dutch judicial authorities had to cope with infringements against their own code of criminal law, not against that of the indigenous society, for all that these frequently ran parallel.

As a consequence, while the Dutch authorities slowly began to take an interest in crimes committed within the Khoi community – or rather only when Khoi had left their community and become totally dependent on white employers – they were always from the foundation of the colony necessarily concerned with conflicts between Khoi and incontrovertible members of the colonial society, that is whites and slaves. As has been shown, in the early years Khoi criminals were tried and punished with the agreement and cooperation of the Khoi chiefs. After around 1700, however, this ceased to be the case, as far more Khoi came to be found in positions within the society where no Khoi chief had the slightest power, or really even interest, over them. Nevertheless, the Dutch could not treat their relations

³⁰) An exception should perhaps be made in the case of a slave who attempted to doctor the food of his fellow slaves to stop them continually hitting him. To do this he bought various medicines from the Khoi. However, he was explicitly punished for attempted poisoning, not for the use of magic. *VOC 4288*, case 10 of 21 Aug. 1777.

³¹) *VOC 4288*, case 4 of 25 Jan. 1753.

³²) *VOC 4301*, case of 8 Nov. 1781.

with the Khoisan as a purely judicial matter, devoid of any political overtones. The running guerrilla war – sometimes of greater, sometimes of lesser intensity – which they waged with the so-called ‘bosjemans-hottentots’ made this impossible. One of the visitors to the Cape in the middle of the eighteenth century observed that the Khoi in service in the farms guided the raiding ‘bosjemans’ to the herds they wished to steal³³). This was strenuously denied by another, in general more trustworthy writer³⁴) but was nevertheless most likely. Certainly, the Khoi on the farms considered that a commando³⁵) of farmers against the ‘bosjemans’ would put them in such danger that it was necessary for them to gather and defend themselves, a sign that the distinction between the two groups was not clear in the minds of those who were most affected by the measures taken against the robbers³⁶).

There is also at least one case of a boy, working on a farm in Outeniqua-land, who was not only described as a ‘bosjeman’, but indeed could not even speak Khoi language and for whom there was no competent interpreter available in Cape Town³⁷). Almost certainly, the boy in question, had been captured in a commando, which generally doubled as bloodletting expeditions (where the adults were concerned) and ‘slave’ raids for children (although of course they were never so called)³⁸). Thus, Khoisan who had, for instance, murdered their master or absconded with his sheep were likely to join one of the groups of ‘bosjemans’, and continue their attack on the colony. The best-known example of this was probably the case of Jager Afrikaner who began his career on the farm of Pieter Pienaar in Namaqualand, but became the most important chief of the raiding groups on the lower Orange river and the founder of a dynasty which was to control much of central and southern Namibia for the first two thirds of the

P. H. Merwe
³³) N.L. de la Caille, *Travels at the Cape, 1751 – 53*, translated and edited by R. Raven-Hart (Cape Town, 1976), p. 41.

³⁴) O. F. Mentzel, *A Geographical and Topographical Description of the Cape of Good Hope (1787)*, edited by H. J. Mandelbrote, 3 vols. (Cape Town, 1921, 1924, 1944), III, p. 261.

³⁵) A commando was an expedition by the burgher militia.

³⁶) VOC 4271, case 13 of 31 Dec. 1772.

³⁷) VOC 4255, case 13 of 16 June 1768. Certain points concerning this case are not in order here. First, there were Khoi available who could perfectly adequately act as interpreters of detailed investigations, although frequently white farmers were used in that role. On the distinction between Khoi and the various ‘San’ languages, see Elphick (1977), p. 29. Secondly, it should be pointed out that Khoisan were never legally enslaved, although the bondage especially of captives, were scarcely different, and arguable harsher.

³⁸) See above all Van der Merwe (1937), pp. 46 – 55.

nineteenth century).³⁹⁾ However, it was these ex-farm servants who, almost certainly, swelled the 'bosjemans' bands to the powerful groups, often with over a hundred members, with which the whites had contend in the later part of the eighteenth century⁴⁰⁾. Indeed, as early as 1738, the first of these large bands, in the Bokkeveld and on the edge of the main granary of the colony in the Swartland, gave the clearest statement of the political intent of these actions, claiming that:

they/the 'bosjemans' / did this to drive them / the whites / out of their land while they still lived in their land, and that this was just a beginning, as they would do this to all the people living around there, and, if this did not help, they would burn all the sown corn that stood in the fields as soon as it was ripe, so that they would be forced to leave their land⁴¹⁾.

By the end of the century, there was a further danger, at least in the far east of the colony. With the beginning of the hundred years' war between the colonists and the Xhosa, the Khoi who worked on the farms had the opportunity of joining with the latter against their masters. This happened most obviously in the 'Hottentot revolt' of 1799, when the British commander, Brigadier Vandeleur⁴²⁾, reported that, in the district of the Zwartkops river (between modern Port Elizabeth and Grahamstown), 'the Hottentots . . . have to a man deserted their Masters' and that 'this contagion of the Hottentots has extended the Long Kloof, where I understand they are also running away from their masters and joining the Renegades in this country'⁴³⁾.

The fact that what began as crime – in the sense of one individual infringing on the rights of another without any ulterior motive – could so easily spill over into war, into the large scale conflict of two communities, had definite consequences for the legal position of the Khoisan within the Cape Colony. In the first place it meant, in fact if not in theory, that they were in general held communally responsible for the 'crimes' committed by

³⁹⁾ For the early career of Jager Afrikaner, see J. Campbell, *Travels in South Africa*, (London, 1815), pp. 299, 305-306, 376-377. Some idea of this section of Cape society can be seen from Pienaars request to the Dutch Government in 1794 that he might be allowed to organise commandos against the San, in exchange for the bounty price of 15 Rixdollars per adult and 10 Rixdollars per child. The Council of Policy forbade this, however, as the purpose of its bounty system was to encourage commandos to clemency, not to further the capture of and trade in large numbers of San. See *VOC 4360*, 75, resolutions of Council of Policy, 11 Jan. 1794.

⁴⁰⁾ Van der Merwe (1937), pp. 7 – 64; Marks (1972), pp. 70 – 74.

⁴¹⁾ Cited in Van der Merwe (1937), p. 8.

⁴²⁾ In 1795 the British conquered the Cape. They returned it to the Dutch in 1803, when it came under the control of the Batavian republic, but reconquered it in 1806.

⁴³⁾ G. Mc C. Theal (ed.), *Records of the Cape Colony*, 36 vols. (London, 1899 – 1905), I, p. 453.

a single Khoi or by a small group. Especially in the last quarter of the century, when the hunts for 'bosjemans' became particular intense, the white commandos did not stop to check whether their targets had been 'guilty' of some 'offense' against the farmers. Rather, they shot first. Their concern was 'die pernicieuse natie, zo niet ten enemaal uijt te roeijen, ten minste tog te beteugelen' ('if not to exterminate this pernicious nation entirely, at least to curb them')⁴⁴). The only really safe Khoi were Khoi who participated in the commandos. Secondly, as has been shown, the whites occasionally had to refrain from taking judicial actions which would have disturbed the peace of the colony. Nevertheless, to a certain extent because the Dutch maintained a somewhat artificial distinction between those they considered 'hottentots' and the 'bosjemans', Khoisan, particularly but not exclusively those in service of farmers, were frequently tried and punished for offences against colonists. The most frequent of these were stock theft and assault on slaves, since the difference between the social status of the two social groups not infrequently gave rise to conflicts, while the deracination of Khoi whose society was falling apart, on the one hand, and newly imported slaves on the other, could only lead to a high incidence of conflict in the quarters where they generally lived together⁴⁵). But the Khoi did not only attack white property, human or bovine, but also frequently attacked the whites themselves, and perhaps failing in their attempts to reach the nearest 'bosjeman' group, were in general executed in Cape Town for their action⁴⁶).

While no white man was ever executed for killing a Khoi, they were certainly when necessary tried and sentenced for offenses against the Khoisan. Indeed, in 1672 almost contemporaneously with the earliest trials of the Khoi, a free burgher, Willem Willemsz., from Deventer, mortally wounded a Khoi (and, what was more, one of a group with which the Company was at that time allied, the Chainouqua)⁴⁷). Willemsz. seems to have fired a shotgun loaded with small shot into the body of the Khoi at close range. He managed to escape to Europe aboard a Danish ship, so that

44) *Landdrost en krijgsraad*, Graaff-Reinet to Governor, 23 April 1787, cited in Van der Merwe (1937), p. 48.

45) Examples of this conflict are numerous in the judicial records of the Cape. It is perhaps worth mentioning that, despite the massive attention devoted to Stanley M. Elkin's book, *Slavery, a problem in American institutional and intellectual life* (Chicago, 1959), there appears to be remarkably little work on the process of the formation of the slave communities in the New World, but for examples see Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750 - 1925* (Oxford, 1976), pp. 327 - 363, and Edmund S. Morgan, *American Slavery - American Freedom; the ordeal of Colonial Virginia* (N. Y., 1975).

46) Once again examples of this can be found in most years throughout the century. It would be vain to try to give complete lists.

47) Moodie, I, p. 320.

he was duly banned from the Cape for life, and his property confiscated⁴⁸). In Europe he was able to obtain a pardon from the Prince of Orange and next year returned to the Cape to claim his property. The Company officials suspected that the pardon was forged, interned Willemsz. on Robben Island, and wrote to the Prince of Orange to check whether he had indeed issued such a pardon, as if William of Orange would have been likely to remember all his actions in that autumn after the murder of the De Witts and his accession to real power. Their argument against the release of Willemsz., interestingly, were 'to prevent any apprehended mischief and particularly to avoid causing any new disturbance among the native tribes, (who are a free people over whom we had no jurisdiction and who are vindictive beyond all example, and will not be satisfied before they have revenged upon the offender, the death of a father, brother or relation)⁴⁹). (Willemsz. was finally exiled to Batavia). In order to keep the peace, in other words the rulers of the Cape were prepared to override the orders of even the Prince of Orange. The theme of subordinating the strict dictates of justice, and even of legal hierarchy to the requirements of colonial safety had begun already.

Despite this pragmatism, there remained a very definite differential in the sentencing of whites, slaves and Khoi. The latter two suffered capital punishment for murdering each other, and, if they murdered a white, were put to death in a particularly gruesome, painful way. Whites, on the other hand, did not die for the murder of a Khoi, or for that matter, of a slave. Not even when the murder was peculiarly cold blooded and unprovoked was this inflicted, although there were occasions when the Dutch authorities came near to doing so. The case which, in a sense, made clear what the limits were occurred in 1744. In that year Martinus Spangenburg, a thirty year old farmer arrived at the farm of the widow Mouton, near the Piquetberg. He was looking for one of 'his hottentots' who had run away. He believed that the Khoi who were there were withholding information from him, so he took one of them, Couragie, outside, first beat him and then, when he attempted to escape, shot him⁵⁰).

During his trial, the prosecuting *landdrost* of Stellenbosch demanded that Spangenburg was hung. The court did not accept this, and by a small majority sentenced Spangenburg to have a shot fired over his head and then be banned for life. As was routine, this sentence was then passed on to the governor, Hendrik Swellengrebel, for confirmation, which was refused.

⁴⁸) Moodie. I, pp. 326, 344.

⁴⁹) Moodie. I, p. 332.

⁵⁰) See *VOC 4162*, case 12, 2 April 1744.

Swellengrebel in effect appealed against the decision of his own court to the higher authority of the government in Batavia. He considered that Spangenburg should indeed be hung arguing that:

it is not permitted to enter the house of an absent neighbour armed with a loaded flintlock to treat his employees, who had come in from their work and sat eating, with great effrontery, still less to beat them with the butt of the gun, let alone, in such a terrible way, to shoot the unfortunate heathen like a dog when he attempted to escape. Moreover, it cannot be argued that there was in this case any necessity or that the shot Hottentot resisted or had threatened the prisoner, who was in fact the initial aggressor. Moreover, he has lived for a long time in this country, first as a farm servant (*boereknecht*) and later as a burgher, and so is well aware that the Hottentots are considered as free inhabitants of this land and that strict edicts (*placcaaten*) have been issued against the maltreatment of these poor people . . . Moreover, since in this thinly settled country, in the past, such terrible actions had been practised, perhaps equivalent to the present case and that these natives were treated in barbarous ways and put to death, as if they were wild animals and not humans, brought forth by the same creator, God's chastising hand has punished (*verzwaart*) this land and many calamities of which the sorrowful examples of the recent past remind us, were caused.

Swellengrebel then cited the *placcaat* of 8 December 1739, which reiterated the frequent prohibitions on cattle trade with the Khoi and laid down that such traders, if they were 'disturbers of the general peace and violators of law and freedom, according to the seriousness and circumstances of the case, /they/ without any exception would be punished corporally, yes even with death'⁵¹). Despite Swellengrebel's pleas, there does not seem to be any record of Spangenburg being executed. Thus, just as with the slaves, the Khoi could not hope for the full protection of the law, since in the eighteenth century that protection entailed that criminals who committed serious offences – and often of course relatively trivial ones, in our modern eyes – be put to death.

Nevertheless, the Khoi received some protection from the law. However, without the possibility of enforcement, these *placcaaten* would remain dead letters. The network of government officials was far too stretched to be able to enquire into all events of which it may have heard rumours. Clearly what was required was the right for Khoi to complain to the authorities of maltreatment they themselves had suffered and of murders

⁵¹) Kaupse *Plakkaatboek*, II, p. 168.

committed against their fellows and in their presence. In effect, crimes against the Khoisan could only be punished if Khoi evidence was treated as equivalent to that of a white, since there would rarely be a white man or woman present when a crime was committed, still less one who was prepared to describe what he or she had seen truthfully. Elphick argued that:

In some cases Khoikhoi were able to initiate actions, in others they were key witnesses establishing the guilt of whites. I have not found examples in this period of the court discounting evidence simply because it came from Khoikhoi – though after 1713 such racialist attitudes did in fact become apparent⁵²).

While the first part of his statement is undoubtedly true – there are numerous examples throughout the eighteenth century, as well in the previous period – the second is far more dubious. Elphick argues on the basis of a single decision of the court of 2 June 1729⁵³). It is therefore worth analysing this case in some detail, since the matter is less clear cut, and more suggestive, than he makes out.

The *landdrost* of Stellenbosch, Pieter Lourentz, had come to hear that six burghers and one *knecht* had pursued a number of ‘hottentots’ under Captain Hobeze, who had stolen some of their cattle, and on overtaking them ‘had put some of these hottentots to death in a brutal (*onmensche-lijke*) way’. However, he had no hard proof of this and requested the advice of the court as to how he should further proceed. The answer of the court was as follows:

On the one hand the enormity of the crime was noted. On the other it was said that the case was only based on the single deposition of one hottentot directed against Christians, without further evidence. It was to be feared that if one came directly to believe the bare word of these heathen, that the wavering and vengeful nation would try to bring more Europeans into distress, as had occurred several times. Moreover, the court had no knowledge of the *factum* or the *Corpus Delicti*, nor had any of the injured hottentots come to complain.

Therefore it ordered the *landdrost* of Stellenbosch to release his prisoners and take no further steps in the matter.

VOC

⁵²) Elphick (1977), p. 186.

⁵³) *VOC* 4112.

The statement of the court certainly contains evidence of racist attitudes which may have influenced its behaviour. However, it would seem more reasonable to suppose that it came to its decision to throw out the case in question very largely on technical legal grounds. The evidence that the *landdrost* presented was so weak that it seems unlikely that he could have got a prosecution no matter who his witness had been. In particular, Dutch law required that all evidence be corroborated by at least one other person. The evidence of one man is no evidence at all⁵⁴). Therefore, it would seem that the court ordered the *landdrost* not to proceed in an effort to save time and expense on a case which would certainly have been thrown out. Whatever their racist attitudes may have been the Dutch officials did not generally let them interfere with their business of running the colony as smoothly as possible, and of making a profit, for the company and for themselves.

A more typical case occurred nine years later. A certain *boereknecht*, Harmanus Cloppenburg, had shot a Khoi in the Verloren Valley, north of the Piquetberg. The unfortunate Schagger Hantje had been attempting to prevent Cloppenburg driving off ten cows which he claimed were due to his master because the Khoi were camped on his master's ground. Two other Khoi complained to Cape Town, investigations were carried out and Cloppenburg was arrested and put on trial. While there seems to have been a few inconsistencies in the reports of the witnesses, which might have allowed Cloppenburg such hope as anyone could ever have of securing an acquittal in the Cape Court of Justice, he did not choose that track. Rather as the *fiscaal* argued:

the suspect claimed that he should not be punished for this crime, because the prosecutor could only produce three, more or less confirmatory, relations by two hottentots and one slave. The prosecutor argues otherwise because, as is it were permitted for the *knegten*, who are hired on the more distant farms, to be their own judges. In that case, many murders would be committed against these people on such flimsy pretexts and many of the arrogant *posthouders* would find themselves heirs to their inheritable cattle. Also as can be imagined, the officer of justice could not take the slightest action against the clandestine trade since they could not be tried for lack of sufficient European evidence, in the same way as in the present case the suspect is trying to persuade the prosecutor and this court that the witnesses

⁵⁴) On the Dutch law of evidence and procedure, see Johannes van der Linden, *Verhandeling over de Judicieele Practijc of Form van Procdeeren*, 2 vols. (2 nd. edition, Amsterdam, 1829), II, pp. 220-247.

were just heathens and he is a Christian and therefore they are to be ignored and he, as a Christian, to be believed⁵⁵).

The Cape government always felt that it needed all the help it could get to control its un-policed and under-administered colony. Unlike most slave colonies, the slave owners might find themselves before the courts as a result of accusations by their own slaves⁵⁶). There was thus no reason why the evidence of Khoisan should not be accepted too.

Nevertheless, although this was the aim of the Cape government, it is far from certain how far it was ever achieved. The farmers against whom the *landdrost* of Stellenbosch was ordered not to proceed in 1729 certainly escaped justice because Pieter Lourents did not present an acceptable case, but the problem remains: why was he unable to collect sufficient evidence to prove his assertions, or alternatively to disprove them so that he would never have mentioned the matter in court? It is far from inconceivable that he was put under such pressure from the local community that he was unable to pursue the matter further. Away from Cape Town, in a small town with little contact with his fellow officials, he would certainly have been subject to such pressure, if it had existed, but evidence for such influence would naturally not have found its way into the official records of the Dutch East India Company, and is also unlikely to have come to the ears of the travellers, who are the main source for the eighteenth century history of the Cape. Certainly, Khoikhoi who were travelling to complain to the *landdrost* were on occasions held and beaten by the burghers whose farms they passed⁵⁷). Moreover, it is clear that towards the end of the eighteenth century the judicial position of the Khoi deteriorated radically. Two examples should make this clear. In 1797 the *landdrost* and *heemraden* of Stellenbosch wrote to the Cape government (by this time under British control), to ask for a decision as to whether a Khoi might summons a white woman for the payment of a debt:

The undersigned *Heemraden* objected to having the case heard before their college, as they are ignorant of whether or not a hottentot has the right to summon a burgher before the College, and of whether, once being allowed, it would open a door and give the hottentots the idea that they are on a footing of equality with the burghers. The ~~first signed~~ *landdrost* was of a contrary opinion and stated clearly that a hottentot

⁵⁵) VOC 4138, case 2 of 16 Jan. 1738.

⁵⁶) See Robert Ross 'The Rule of Law at the Cape of Good Hope in the Eighteenth Century', *Journal of Imperial and Commonwealth History*, 9 (1980).

⁵⁷) VOC 4142, *relaas* of Garren, Hale and Hori, 14 March 1739, in case 25 of 12 Nov. 1739.

should be recognised before the law in the same way as himself and that this constituted the true equality since before the law all were of equal standing⁵⁸).

Secondly, thirty years later, the Commissioners of Enquiry into the state of the Cape Colony recorded that, before 1819,

it was not customary to administer oaths to Slaves, Hottentots, and persons of similar condition, on account of their ignorance of all religious obligation, and that altho' the evidence of such persons was and had been received by way of information, and not of proof, except where it was confirmed by other circumstances, yet that this usage was not conformable to Law, and that consequently such evidence had been at all times open to objections to credit, or as they are technically called, 'reproaches'.⁵⁹).

The officials of the Dutch East India Company never had any such scruples. Their legal system was more nakedly an arm of government than that which succeeded them, but the latent conflict between the company officials and the burghers had the effect of affording some legal protection to the Khoisan, at least where the Company was able to exert its authority sufficiently. It is not chance that the three most important challenges to the authority of the Company originating from the burghers all had disputes about the Khoisan among their proximate causes. The dispute between the free burghers and Willem Adriaen van der Stel, which came to head in 1706, was very largely a struggle for the control of economic resources, notably access to the market provided by the V.O.C. ships, but also very definitely including the right to trade in cattle with the Khoikhoi. Whether or not Van der Stel was acting out of altruistic motives or merely attempting to corner the meat supply to the V.O.C., his ostensible motive for forbidding burghers cattle trading expeditions to the Khoi was the fact that a previous one had been not so much a mercantile encounter as a full-scale cattle raid⁶⁰). Twenty years later, when Barbier was trying to raise the burghers of Stellenbosch against the Company, one of the grievances he tried to play on was the use of Khoi evidence against burghers who had been on a trading

⁵⁸) Cited in A. du Toit and H. Giliomee (eds.) *Afrikaner Political Thought, 1775 – 1975*, 2 vols. (Berkeley and Los Angeles, forthcoming).

⁵⁹) Theal, *RCC*, XXXIII, p. 79.

⁶⁰) Elphick (1977) pp. 228–229; L. Fouché (ed.), *Het Dagboek van Adam Tas* (London, 1914), p. 343; A. J. Böeseken, *Simon van der Stel en Sy Kinders* (Cape Town, 1964) pp. 170–171; F. C. Dominicus, *Het ontslag van Willem Adriaen van der Stel* (Rotterdam, 1928), pp. 34, 78.

expedition to the Nama which had ended in violence⁶¹). Finally, some decades after Barbier was executed, the arrest of Carel Buitendag, which gave the occasion for much pent-up feeling to burst out in the Patriot movement, was brought about by his behaviour towards Khoisan in the Bokkeveld and by the policy of the government to keep the less controllable burghers out of the more distant districts where they might attack the Khoi⁶²).

While the Company officials made occasional attempts to control the burghers' subjection of the Khoisan, it is clear that they were slowly but surely loosing their grip on the country. With the Cape making a loss at the best of times, and the V.O.C. as a whole steadily weakening financially, there was no possibility of the Cape administration extending to keep pace with the boers as they moved into the interior. On one occasion, a farmer from the far east of the colony, who had come to Cape Town on his annual trip, was so sure of his rights over his Khoi workers that he attempted to kidnap one of them from the house of the *fiscaal* himself, where he had taken refuge in an attempt to avoid having to return with his *baas*.⁶³ By 1778, the governor, Joachim van Plettenberg, on his tour of the interior, reported that there were no longer any Khoi who were not in service with a farmer⁶⁴). In a sense, the Company accepted this situation. They did not attempt to impose regulations as to demand contracts between Khoi and their employers. This was left for their successors, first the government of the Batavian republic and later the British⁶⁵). The latter proclamation, issued by the Earl of Caledon in 1809, ordained that all agreements between Khoi and farmers be written and registered with the local *landdrost*, but at the same time effectively tied the Khoi to their masters by laying down that:

the Hottentots going about the country, either on the service of their masters, or on other lawful business, must be provided with a pass, whether of their commanding officer, if in the military service, or the master under whom they serve, or the magistrate of the district, on penalty of being considered and treated as vagabonds.

The British indeed prided themselves that this measure had been to the benefit of the Khoi themselves, and 'had rescued them from a system of

⁶¹) G. McC. Theal (ed.), *Belangrijke Historische Documenten, II* (Cape Town, 1909), part 2, p. 2.

⁶²) C. Beyers, *Die Kaapse Patriotte* (Cape Town, 1929), *passim*, esp. p. 195; G. J. Schutte, *De Nederlandse Patriotten en de Koloniën* (Groningen, 1974) pp. 62-63.

⁶³) *VOC 4344*, case of 8 Oct. 1789.

⁶⁴) *Kaapse Plakkaatboek*, VI, p. 24.

⁶⁵) Theal, *RCC*, VII, p. 211. For the working of the system, see J. S. Marais, *The Cape Coloured People, 1652 - 1937* (London, 1939) Ch. IV.

hardship and cruelty, practised towards them by the Boers, which could, in the course of a short time, have extinguished the race⁶⁶). The British have long been famous for their hypocrisy, but even the fact that they dared voice such sentiments shows how far the Company had lost its legal grip on the Cape *platteland* and how the Khoi had, by the end of the eighteenth century, been reduced to the level of unfree servants. Rights they might have retained, but they could no longer exercise them.

⁶⁶) W. Bird, *State of the Cape of Good Hope in 1822* (London, 1823, reprinted Cape Town, 1966), p. 8.

Shaw